Supreme Court, U.S.
FILED
OCT 1 2003
OFFICE OF THE CLERK

No. 03-282

In the

Supreme Court of the United States

JOHN PADBERG, CLIFFORD PAOLILLO and RASHID AHMED, individually and on behalf of all others similarly situated,

Petitioners,

v.

DIANE MCGRATH-MCKECHNIE, RUDOLPH W. GIULIANI, JOSEPH MCKAY, MATTHEW DAUS, HARRY RUBINSTEIN, ELLIOT SANDER, HARVEY GIANNOULIS, MARVIN GREENBERG, RAMONA M. WHALEY and NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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This case is about whether a city agency, in response to a single service refusal offense, may constitutionally revoke taxi drivers' licenses even though the governing statute states that the penalty for the violation, if proved, is a fine of "not less than two hundred dollars or more than three hundred and fifty dollars." In their Brief In Opposition, Respondents obfuscate the record and defend an illegal state policy as "merely unauthorized." In fact, hundreds of New York City taxi drivers have had their licenses revoked without legal basis or fair notice. Moreover, nothing in this Court's substantive due process jurisprudence excuses Respondents' actions as the right to be spared an illegal punishment is deeply rooted and "enshrined in our constitutional jurisprudence." *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996)

I. The TLC Has Admitted That Hundreds of Taxi Drivers Have Been Deprived of Their Licenses Because of Operation Refusal

First, Respondents attempt to minimize the scope of Operation Refusal and pretend that it may be limited to just a few taxi drivers, not untold hundreds. (*See* Brief in Opposition at 6, n.2) They even imply that this case involves only John Padberg, who is the putative class representative for all New York City taxi drivers affected either actually or potentially by the New York City Taxi and Limousine Commission's (the TLC) lawless reign. In fact, the record demonstrates that hundreds of drivers have been harmed.

On June 26, 2000, Peter Mazer, then deputy general counsel to the TLC (since promoted to general counsel) stated in an affidavit, part of the record on appeal, that between Nov. 11, 1999 and June 11, 2000, the TLC issued 156 summonses pursuant to Operation Refusal. On Nov

26, 2000, Respondents stated in interrogatories, also part of the record, that from Nov. 12, 1999 to Nov. 22, 2000, 254 taxicab drivers had been suspended pursuant to Operation Refusal. The policy continued for at least two years after that. Indeed, to this day, the TLC claims the right to revoke a taxi driver's license based on a single service refusal even though the governing statute clearly states that the penalty for a first service refusal is a fine "not less than two hundred dollars or more than three hundred and fifty dollars." N.Y.C. Admin. Code § 19-507 (b) (1989). Thus, it is fair to say that the named petitioners were among hundreds of tax drivers affected. Moreover, all 41,000 NYC taxi drivers live with the threat of revocaton. If these suspensions and revocations were unauthorized, that means that the taxicab drivers' property rights were taken without due process of law. *See BMW of North America, Inc. v. Gore*, 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.")

It is true, and Petitioners "admit" as much, that Petitioners do not know precisely how many cabbies have been thrown out of work, how many have been suspended and how many have been revoked. But the respondents must know. For some reason they deliberately avoid informing this Court of the exact number, just as they avoided informing the district court and the court of appeals. Respondents also claim in their Brief In Opposition, that revoked drivers may seek reinstatement. Even if this assertion is true, it is nowhere in the record and nowhere in the TLC rules.

The attempts to confuse the facts are particularly unfortunate in a case where petitioners were not

permitted to take a single deposition. Nevertheless, the district court found that "[respondents] were acting pursuant to authority that they believed they possessed in order to further the legitimate interest of eliminating racial discrimination among taxicab drivers."

In fact, there is nothing in the record to indicate that this was Respondents' belief or their goal. It is certainly the case, however, that the TLC claimed the right to revoke licenses for service refusals (such as destination-based refusals) where alleged racial bias had nothing to do with it. *See* District Court opinion at A-32a-A33a ("Nevertheless, in practice Operation Refusal mandates summary suspensions for any kind of service refusal, whether it is race-based or not. The Operation Refusal Enforcement Directive says nothing about specifically targeting race-based refusals....")[1] There was no evidence that all, or even most, of the revocation cases in fact had a racial aspect. Respondents' sanctimony is especially misplaced when the evidence indicates not that the TLC acted "in response to passenger complaints" generally. *See* Brief in Opposition at 6. Operation Refusal was touched off by the widely publicized complaint of a single passenger, the movie star Danny Glover, which the Mayor and even the District Court acknowledged.[2] *See* District Court

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[1] There is also no proof or reason to believe that as a matter of practice the TLC tried especially hard to stop bias refusals as opposed to destination refusals (such as when a cab driver in Manhattan favors an airport fare or declines a trip to Queens). Certainly, the TLC never presented any such evidence either in this action or to the public.

[2] This is not to say that other passengers have not, quite legitimately, complained over time, or that public officials are not permitted to respond to public furor. But the actual facts undermine the idea that the TLC was responding to some newfound emergency, that it had no time to seek legislative authority for its

opinion at A-10a. Moreover, no motive, no matter how laudable, justifies disregarding the law.

II. Nothing In TLC Regulations Gave Taxi Drivers Notice of the TLC's Revocation Policy

Respondents suggest that New York City taxi drivers had notice of the prospect of revocation based on part of a TLC rule that provides that "[n]othing contained herein shall limit or restrict any other authority the Commission may have to suspend or revoke a driver's license." (Brief in Opposition at 22) Of course, this reading was rejected by the OATH courts and two state courts, that is by every independent court to consider the issue. Respondents ignore these decisions. But even if a taxicab driver had predicted such a strained interpretation, he would have been thrown off by the language of the statute, which states, in pertinent part, that a driver found in violation of the rule against service refusals "shall be fined not less than two hundred dollars nor more than three hundred fifty dollars for the first offense." A driver would have also been baffled by the fact that in announcing Operation Refusal, neither the Mayor, nor TLC officials, nor the press reports mentioned revocation—though they all mentioned summary suspensions. Not even Respondents claim that the new policy of charging alleged refusers also with "conduct contrary to the best interests of the public" was announced publicly. (Brief in Opposition at 6) These are the key facts that no one can deny.

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actions or to hold a vote of the full commission, or that it made some considered judgment about its own authority.

Sometime after their suspensions, the TLC did tell drivers like Mr. Padberg that their licenses might also be revoked. The OATH courts, of course, emphatically rejected this penalty as unauthorized by law. Though the courts below don't quarrel with the OATH courts' reasoned and indeed quite obvious conclusion of law, Respondents continue to insist they had this right based on a procedural rule that merely says the drivers should be granted a hearing.

Respondents attempt to place the constitutional bar lower and lower. For instance, they argue: "Indeed, Petitioners fail to cite any authority to support their view that ... the [New York City] Charter required the TLC Chairperson to submit the suspension and revocation policy to a full TLC Commission vote." (Brief in Opposition at 17) There is, of course, no direct case law, as the situation has not arisen before.

In the court of appeals, however, as Respondents know, Petitioners did cite several state decisions all of which demonstrate that for a commission to act lawfully, it needs a majority vote of its members. *Town of Smithtown v. Howell*, 31 N.Y. 2d 365, 339 N.Y.S. 2d 949 (1972) (failure to obtain 10 votes of 15 members fatal to attempted zoning change); *D.E.P. Resources, Inc. v. Planning Bd. of the Village of Monroe*, 131 A.D.2d 757, 516 N.Y.S.2d 954 (2d Dep't 1987) (three votes out of five-member board needed for board to act); *Rockland Woods, Inc. v. Incorporated Village of Suffern*, 40 A.D.2d 385, 340 N.Y.S.2d 573 (2d Dep't 1973) ("The purpose of the statute is to insure that before official action is taken by a public body, there must be clear and express authority by a majority of its members.") Petitioners did not cite these cases, or others cited below, in their Petition because the courts below did not decide the legality of the TLC policy. Instead they

waived this flouting of constitutional and democratic norms away as "arguably incorrect" (A-3a) or "merely 'incorrect' or 'ill-advised'" (A-35a). Tellingly, Respondents reduce the standard even further to "Merely Unauthorized." (Brief in Opposition at 18) At that point, petitioners cite "substantive due process" and their illegal acts are supposedly excused.

III. When A State Agency Deliberately and Lawlessly Took Petitioners' Licenses, That Action Violated Due Process

When a state policy is illegal—or "merely unauthorized"—and it deprives citizens of their property rights and their rights to work, the Constitution is offended. It is the case that not all state law violations are constitutional violations. If, for instance, the violation of state law is "random and unauthorized" and state law provides a remedy, a plaintiff may not invoke 42 U.S.C. § 1983. *E.g. Parratt v Taylor*, 451 U.S. 527 (1981). But where the state action is deliberate and in pursuit of an explicit policy and that policy is illicit, Section 1983 may be invoked.

Respondents note that Petitioners did not discuss *Interport Pilots Agency Inc. v. Sammis*, 14, F. 3d 133 (2d Cir. 1994), the one case on which the court of appeals relied. But even a cursory examination of that case actually demonstrates just how far the TLC strayed from constitutional standards.

In *Interport Pilots*, the Second Circuit considered the issuance by a New York State board of "notices which had the effect of discouraging [Long Island Sound] shippers" from hiring Connecticut shipping pilots. The Second Circuit found that the legal question – the construction of the Federal Boundary Waters Act -- was

one of first impression. 14 F.3d at 136. Examining the state law in detail, it found that the New York board's policy did violate the act. It noted, though, "No court or any other governmental authority had ever issued a binding interpretation of the law." *Id.* at 139. In other words, as with other substantive due process cases, the Connecticut pilots could point to no established right that had been disturbed.

The Second Circuit found further that the defendants had relied on a legal opinion by the New York Attorney General as well as the advice of counsel. *Id.* In this case, many courts have already ruled on the basic illegality of the TLC's conduct, and the TLC cannot point to a single before-the-fact legal opinion on which it relied or even considered. In *Interport Pilots*, the Second Circuit ruled based on a trial record that established the defendants' good faith. Here, the District Court relied solely on the assertions of TLC litigators. *Interport Pilots* rested in part on the conclusion that the board's actions were "essentially legislative rather than adjudicative [and] not subject to the notice and hearing requirements of the due process clause." *Id.* at 142. Here the action was not legislative – indeed that is part of the problem. Finally, the Connecticut pilots' licenses were neither suspended, nor revoked, though their business was allegedly disrupted. Here, the TLC has actively stripped drivers of their licenses – first summarily and then permanently – by executive decree and in clearly judicial (albeit lawless) proceedings.

Interport Pilots, like *Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999), and the other zoning cases on which the district court relied, all rest on an "analysis [of] nature of the applicant's interest in the approval being sought, specifically whether the applicant has a

clear entitlement to the approval...." *Walz v. Town of Smithtown*, 46 F.3d 162, 168 (2d Cir. 1995). They are in line with this Court's decisions because they ultimately rest on whether the government action was arbitrary, as opposed to deliberate, and whether the plaintiffs could point to an established, as opposed to newfound, right. There is no question that the State of New York or the City of New York has the authority to legislate against service refusals and to penalize drivers. Had their actions been inadvertent, petitioners would certainly not be seeking relief here. But the actions were deliberate and pursuant to policy, yet in defiance of law. That law was enacted to define how (if at all) taxicab drivers might be punished, and it has been trampled. Even if respondents believed they were right—and there is no evidence they did—that is no defense. "The central aim of the Civil Rights Act was to provide protection to those persons wronged by the '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Owen v. City of Independence, Mo.* 445 U.S. 622, 650 (1980) (citing *Monroe v. Pape*, 365 U.S. 167, 184 (1961) quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

While not every state wrong can be remedied, where a city agency acts in defiance of law for political ends, nothing in this Court's jurisprudence suggests that respondents are immune from liability. The general idea that a state agency can only punish individuals in accordance with law is central not just to Section 1983, but to the law of damages, criminal law, and administrative law. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. __, 123 S.Ct. 1513 (2003) (punitive damages must be reasonable and within constitutional limits); *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (judges discretion in determining criminal penalties

circumscribed by law); *Securities and Exchange Comm'n v. Sloan* 436 U.S. 103, 112 (1978) (government may not take license to trade securities without lawful authority). In other words, the right is "fundamental" and "objectively 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U. 701, 720-21 (1997) (Rehnquist, C.J.) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

No effort to place this action in the "substantive due process" box should obscure the TLC's rampant lawlessness. Just as the TLC has no right to suspend a driver without a hearing, it should have no right, as Justice Rehnquist said in *Sloan*, to revoke his license without, an "unmistakable mandate." *Id.* at 113. Without such a mandate, without legal authority to revoke taxi drivers' licenses, the revocations are arbitrary and in violation of the Due Process Clause.

If anything in law is clear, it is that when the legislature has established a penalty for the violation of a rule—in this case, a fine of up to $350—the executive and administrative judges in their employ are limited by that penalty. Here, an executive agency has deliberately and continuously, as a matter of policy, violated the law that is supposed to govern it. Hundreds of taxi drivers have suffered tremendously as a result. This Court should grant the petition to enforce the law and the constitution and make it right.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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